IN THE

Supreme Court of the United States

MICHAEL PECORARO and SAM GROSS,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below.

The Court below rendered an opinion, a certified copy of which is annexed to the record submitted herewith. The opinion is not as yet officially reported.

Jurisdiction.

The decision affirming the conviction was handed down on November 4th, 1940. The decision denying the petition of Gross for rehearing, was handed down on November 18th, 1940.

The jurisdiction of this Court is invoked under Sections 237 and 240(a) of the Judicial Code as amended by the Act of February 13th, 1935. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7th, 1934.

Statement.

The essential facts have been stated in the petition. The petitioners were convicted of the crime of conspiring to

violate certain provisions of the Internal Revenue Law on the theory that they had associated themselves with the operators of illicit stills by supplying materials used in the operation of the stills. The record fails to disclose sufficient, if any, proof that the petitioners supplied material to the still operators nor does the record show that the petitioners, particularly Gross, knew of the intended illegal use of the materials allegedly sold to the still operators. There is no proof that the petitioners operated the still. Furthermore the decision made in the case at bar is inconsistent with the ruling made in the case of *United States* v. *Falcone,* 109 Fed. 579 (2nd Circuit).

Statutes Involved.

SECTION 88, TITLE 18, U. S. C. A.

CRIMINAL CODE, section 37. Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

POINT I.

The Circuit Court of Appeals for the Second Circuit erred in holding that the respondent offered sufficient proof to connect the petitioners as co-conspirators.

As stated in the petition, it appears that the theory of the Respondent is that the Petitioners' guilt is substantiated by the fact that Petitioner, Pecoraro, supplied sugar to the persons operating the still at the Herth Farm; that he took alcohol in payment of the moneys due him from the illicit

distillers and that one Franzone, a co-defendant named in the indictment but not on trial, was working at the Herth Farm still for the interests of Pecoraro for sixteen days during which period Pecoraro carted alcohol from the still. That, Petitioner Gross is alleged to have sold a completely denatured alcohol called "Anti-Freeze" to the distillers without filing the proper notices pursuant to the Regulations and allegedly appeared at the Herth Farm still after it was seized, ostensibly for the purpose of securing the return of the drums of "Anti-Freeze."

The testimony relating to the Petitioner, Pecoraro indicates that on two occasions he was at the Herth Farm for the purpose of collecting moneys owed to him. There is however nothing to show his interest or participation in the illegal enterprise aside from the declaration allegedly made by Franzone to Herth that he was working at the still in the interest of Pecoraro and that for a period of sixteen days, the Petitioner, Pecoraro removed from the still premises alcohol upon which no tax had been paid.

Counsel contends that the declaration of Franzone as to whose interest he was working is incompetent since it was not made in furtherance of the conspiracy. Furthermore Franzone was not on trial with Pecoraro.

It is conceded that if Pecoraro removed alcohol from the still he may have committed a substantive offense but the commission of such crime is no proof of participation in the conspiracy.

The proof as against the Petitioner, Gross, is of even less weight. It is contended that his part in the conspiracy consisted of supplying seventeen drums of completely denatured alcohol called "Anti-Freeze", without making a report of the disposition. The testimony adduced at the trial indicates that seventeen of the eighteen drums originally consigned to Petitioner, Gross, were found at the Herth Farm still, however the presence of these drums on the still premises is not sufficient to warrant a judgment of conviction. Furthermore

it was disclosed at the trial that Petitioner Gross had reported a robbery to the Police Department of the City of New York on October 22nd, 1938 which was prior to the seizure of the still; and that a report was made to the Alcohol Tax Bureau, after the still was seized, that 18 drums of "Anti-Freeze" were included in the robbery (R. pp. 207, 209, 325, 326, Ex. 16). This letter specifies eighteen drums seventeen of which are identical with the seventeen drums found at the Herth Farm. The testimony as to Gross' presence at the still after it was seized is not conclusive. Rodono, one of Respondent's witnesses testified that he took Gross to the still premises to secure a return of the drums. He also said that he did not know Gross prior to the time that he came to Gross' place of business to invite him to accompany him (Rodono) to the Herth Farm. However, another witness, Musso, testified that he spoke to Rodono when he and another man appeared at the Herth Farm with reference to the drums but he could not identify Gross as the other man.

The mere presence of the drums at the Herth Farm does not create the inference that Gross sold the drums to the distillers inasmuch as Gross had complained of a robbery and it may be that the presence of the drums at the still was not the result of any activity on Gross' part. If we were to assume that there was no robbery and that Gross had sold the drums to the distillers and failed to report the sale such assumption without proof of Petitioner Gross' active participation or interest in the distiller's venture, can not create the inference that he participated in the conspiracy, since it has been held that a vendor of materials to an operator of an illicit still is not *ipso facto* a participant in a conspiracy even if it can be shown that such vendor knowingly made the sale, as was *not* done in this instance.

In the case of *U. S.* v. *Falcone, supra,* the Circuit Court of Appeals for the Second Circuit, held that a vendor is not guilty of conspiracy by virtue of a sale knowingly made. There must, in addition to the making of the sale, be some

proof that the person has some interest in the venture or some stake in its outcome.

The Circuit Court ruled in its opinion in the instant case, that the petitioner, Gross, in effect, "shielded the buyers and actively assisted their project by his failure to report the sales". This statement however is inconsistent with the ruling in *U. S.* v. *Falcone, supra.* In the Falcone case, the Circuit Court reversed the conviction as against those defendants who were shown in some way to have cooperated with the operators of the still. The situation as to Gross is not different. His failure to report the sales, while in itself, if conceded, may be termed a criminal act, yet it is not of such scope as to make him a participant in a conspiracy. There is absolutely no proof that Gross knew to what use the denatured alcohol was being put by the still operators. Furthermore, there is no proof that Gross sold denatured alcohol.

The proof of sale of the "Anti-Freeze", is based on the inference that seventeen of the eighteen drums originally consigned to Gross were found at the Herth Farm still, and that no report of the disposition of these drums had been made. Yet, as against this, is testimony that Gross claimed these drums had been stolen (R. pp. 326, 329). Certainly, the guilt of the Petitioner, Gross, was not proved by the finding of drums, the sale of which is merely inferred.

Even if we were to assume that the petitioners did commit overt acts, the commission of such acts is not sufficient to show that the petitioners are participants in a conspiracy. The law requires more.

It must be shown that there is a common and unlawful design and that the persons knowingly participated in such common and unlawful design. Assuming the petitioners knew that an illegal enterprise was afoot, it cannot be said that on this mere knowledge alone, they are guilty of the conspiracy without proof that they participated in it. See *U. S.* v. *Falcone,* 109 Fed. 2nd 579.

In the cases of *U. S.* v. *Dellaro,* 99 Fed. 2nd 781 (2nd Circuit), *Linde* v. *U. S.,* 13 Fed. 2nd 59 (8th Circuit), *Weinger* v. *U. S.,* 47 Fed. 2nd 692 (9th Circuit), and *Turcott* v. *U. S.,* 21 Fed. 2nd 829 (7th Circuit), it was held that in order to become a party to a crime, the commission of an overt act is not sufficient, but some affirmative act must be proven on the part of the person to be charged showing an agreement to take part in the conspiracy; that mere knowledge of the illegal acts of others is not sufficient.

Furthermore, in the case of *Wilder* v. *U. S.,* 100 Fed. 2nd 177 (10th Circuit), the Court ruled that the mere failure to prevent the conspiracy is not enough to support a conviction upon a charge of violating Section 37 of the Criminal Code, Title 18, U. S. C. A. Section 88, and that it was necessary to prove that a defendant consented in some affirmative way to become a party to the concert of action.

CONCLUSION.

It is respectfully submitted that there is a serious question of law involved in this application in that the question of the consistency of the determination in this case with the determination of a similar case in the same Court below, is presented, as to whether or not a vendor of raw materials is guilty of participating in a conspiracy merely because he knew that there was a conspiracy, after having failed to report the sale of the raw materials pursuant to the Regulations.

For the foregoing reasons, it is submitted that the serious question of law involved in this application is of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

LOUIS HALLE,
Attorney for Petitioners.